United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1409

To be argued by
HENRY H. KORN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1409

UNITED STATES OF AMERICA,

Appellee,

—v.—

JACK LEVINE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

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Preliminary Statement

Jack Levine appeals from a judgment of conviction entered on September 7, 1976, in the United States District Court for the Southern District of New York, after a 5-day jury trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment 76 Cr. 498, filed on May 24, 1976, charged Levine in Count One with having conspired with Martin Frank and David Kolatch to evade a large part of his 1969 federal income taxes and to file a false tax return for 1969, in violation of 18 U.S.C. § 371. In Count Two, Levine was charged with having evaded a large part of the income taxes for 1969, in violation of 26 U.S.C. § 7201, and in Count Three, Levine was charged with filing a false tax return for that year, in violation of 26 U.S.C. § 7206(1).

Trial began on July 13, 1976 and ended on July 17, 1976 when the jury found Levine guilty on Counts Two and Three.*

On September 7, 1976, Judge Bonsal sentenced Levine to 3 months' imprisonment on Count Two, to be followed by 2 years probation on Count Three, and a fine of $3,000 on each count, payable in 6 months.

Levine is at liberty pending this appeal.

Statement of Facts

The Government's Case

A. Synopsis

The Government proved that Levine gave a gift of restricted stock to a Long Island Jewish parochial school in 1970, but falsely claimed on his 1969 federal tax return that he had given the stock in late May, 1969, at a time when the stock was trading at a much higher dollar value than in 1970. The proof showed that by falsely claiming that he had given the gift in May, 1969, Levine was able to report a $287,489 charitable contribution on his 1969 federal return, which resulted in an evasion of $8,365 in taxes for 1969 and permitted Levine to carry-forward the remainder of his contribution for the next five tax years.

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* The conspiracy count had been dismissed at the close of the Government's case on July 15, 1976. (App. 2). "App." refers to the Joint Appendix; "Tr." refers to those pages of the trial transcript not referred to in the Joint Appendix; "GX" refers to Government Exhibits; and "Br." refers to defendant's brief.

The proof showed that Levine's evasion was facilitated by a corrupt attorney, Martin Frank,* as well as the administrator of the parochial school, David Kolatch, who, after receiving the gift of stock in 1970, provided Levine with a backdated letter which falsely acknowledged receiving the stock in May, 1969. Both Frank and Kolatch testified for the Government.

B. The Origins of the Evasion Scheme

In 1968, Martin Frank enrolled his daughter in the second grade of the Hillel School in Lawrence, New York. Thereafter, David Kolatch who administered the school and had charge of soliciting contributions for the school, which historically had had financial difficulties, approached Frank's wife and asked her to obtain her husband's assistance in raising funds. (App. 29, 110-13).

On a Sunday morning in either December, 1969 or January, 1970, Frank visited Kolatch at the school. He told Kolatch that some of his business associates were in a position to help the school. (App. 114). Frank explained that the bulk of his law practice involved representing broker-dealers in securities transactions and that he could obtain stock from some of his broker-dealer clients as contributions to the school. (App. 31-32). Frank advised that in return Kolatch would have to be prepared to give letters acknowledging the gifts of stock at a date that the donor would select, thereby permitting the donor to get the benefit of the largest tax deduction possible.** (App. 33). After outlining the backdating

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* This Court is not unfamiliar with Frank's misdeeds. See *United States* v. *Frank*, 520 F.2d 1287 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976).

** Frank had considerable experience in such a scheme, having backdated in 1968 gifts of restricted stock to certain charities to take advantage of the tax benefits available through such transactions. (App. 34).

plan to Kolatch, Frank said that he would communicate with Kolatch at a later date. (App. 114).

C. The Deliveries of Stock Begin

Several weeks later in late January or early February, 1970, Frank returned to the school, again on a Sunday morning, with a gift for the school consisting of a packet of stock certificates, including the stock of Prevor-Mayerson, International, Inc. (App. 115). Frank told Kolatch to acknowledge the gifts to the various donors by letters dated a few days after the date indicated on the donors' letters transmitting the stock, which were also included in the packet. (App. 116).

One of the contributors in this first batch of stock was a Mr. Jessie Krieger whose letter transmitting the 3,000 shares of Prevor-Mayerson was dated January 30, 1969. (App. 116; GX 9).* Kolatch acknowledged receipt of Kreiger's stock by a letter on school stationery dated February 14, 1969. (App. 117; GX 9).**

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* Krieger was indicted for tax evasion and filing a false tax return for the tax year 1969 as a result of his gifts to the Hillel School. 76 Cr. 372. Krieger lated pled guilty before Judge Knapp.

** Kolatch had no difficulty in fixing a date for his receipt of the Krieger stock. The Krieger stock, unlike most delivered by Frank, was unrestricted and therefore could be immediately sold to the public. Kolatch recalled that the school was in desperate need of money and he therefore promptly sent the Krieger stock to a broker for sale. Kolatch's February 26, 1970 letter to a brokerage house, Dopler, Grey & Company, requesting the firm to sell the stock for the school's account, confirmed that he had received the Krieger stock in early 1970. (App. 117; GX 9).

D. Levine's Donation

In February of 1970, Frank, Levine's attorney and friend, contacted Levine and told him that he was trying to raise funds for the Hillel School (App. 35); that he knew Levine had restricted stock; and that, if Levine had not yet filed his 1969 tax return, he could give a gift of restricted stock to the school and, in return, the school would provide him with a letter acknowledging the gift on any date in 1969 Levine selected. (App. 35). Frank also explained that Levine could pick the best price for the stock in 1969 and that under the tax law Levine would be able to carry forward the unused portion of any gift as a deduction in future tax years. (App. 35, 36). Levine told Frank that he would think over the proposition.

A week or ten days later, Levine called Frank to say that he wanted to donate 16,666 shares of restricted stock of Salem Electronics, Inc., to the school. (App. 38-39). Two days later Levine again called Frank this time to tell him the date, on which he would claim he gave the gift, May 26, 1969. (App. 39; GX 7). Frank told Levine that he would prepare a letter to the school to accompany the donation and that Levine could sign it when he delivered the stock certificate to Frank. (App. 39).

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* Levine had obtained his shares of Salem Electronics in March, 1969, at which time he was employed as a stockbroker for L. B. Meadows. The shares were compensation for his assistance in the sale of Salem Electronics to another company. As compensation, L. B. Meadows received 50,000 shares of Salem Electronics and Levine received 16,666 shares. The stock was restricted. (App. 178-81).

Thereafter, Levine brought the stock certificate to Frank at his law office in New York City. (App. 39). When Levine delivered the certificate, it had already been endorsed with the necessary guarantees. (GX 8; App. 39).* Frank then prepared the transmittal letter to the school, which Levine signed, and Frank called Kolatch. (App. 45). Frank advised Kolatch that the stock was in his office, that the transmittal letter had been signed and that he would soon deliver the stock and letter. (App. 45).

Frank delivered the Salem Electronics stock, together with the transmittal letter, dated May 26, 1969, to Kolatch, again on a Sunday morning. (App. 48, 120). After receiving Levine's stock, Kolatch instructed his secretary to send an acknowledgement letter to Levine dated May

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* The signatures on the back of the stock certificate guaranteeing Levine's endorsement directly undercut Levine's contention that he gave this stock to Frank for delivery to the Hillel School in late May, 1969.

The back of the certificate contained, in addition to Levine's endorsement, the signature of Samuel Weisberger, the sole proprietor of a brokerage firm, formed in May, 1969, named Continental Securities Co. (Tr. 290, 301). The signature of Weisberger on the certificate guaranteed Levine's signature. (Tr. 290). But because Continental Securities was not a member firm of the New York Stock Exchange, before the guarantee of Levine's signature was complete, it was also necessary for a bank to guaranty Weisberger's signature, as well. (Tr. 289-90). The bank which guaranteed Weisberger's signature was Chemical Bank, but Continental Securities did not open an account with Chemical Bank until November 20, 1969. (Tr. 213, 291; GX 16).

Since there was testimony that Chemical Bank would not have guaranteed Weisberger's signature until Continental Securities opened an account with them (Tr. 218, 291), it was clear that the Bank's guarantee could not have been put on the certificate until at least November 20, 1969, five months after Levine claimed he gave the stock to Frank.

28, 1969. (App. 124, 125; GX 1).* After the acknowledgement letter had been prepared, it was sent to Levine. (App. 129).

E. The Price of Salem Electronics Stock and the Preparation of Levine's Return

The high asked price for Salem Electronics stock on the over-the-counter market in 1969 was $32 a share. By selecting May 26, 1969 as the date for his purported gift, Levine picked a day when the stock sold close to its high price for 1969—$28 per share. Since the high price for Salem Electronics was only $4¾ per share for all of 1970, Levine's selection of the May 26, 1969 date permitted him to avoid the sharp decline in price which his stock had suffered. (Tr. 191-94; App. 196).**

When Richard Charles, Levine's accountant, learned that Levine was claiming a $287,489 charitable contribution on his 1969 return, he was surprised since Levine had never previously given a contribution in excess of $500. (Tr. 238, 321). Charles discussed the Hillel con-

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* The May 28, 1969 acknowledgement letter to Levine was typed on school stationery containing on its letterhead the name of Max Wagner, as the school's president. Wagner, however, was only elected president in June, 1969 and was not installed in office until September, 1969. (App. 129-31; GX 11, 12, 13). Kolatch did not begin to use this stationery until the new officers, including Wagner, were installed. (App. 134). This stationery was therefore not in use as of May 28, 1969, the date on the acknowledgement letter. (App. 134). Indeed, since Wagner was not elected until June, 1969, the stationery clearly could not have been printed until after the date on the letter.

** In 1971 or 1972, when Kolatch sought to sell the stock, he learned that "it had no value, almost zero. One-eighth, something like that." (Tr. 188).

tribution with Levine and told him that Levine would need "substantial proof" to justify the deduction. (Tr. 240). Levine then produced the acknowledgement letter dated May 28, 1969 (Tr. 268), and Charles used the stock quotation for Salem Electronics published in the National Quotation Bureau's "pink sheets" to substantiate the amount of deduction. (Tr. 267).

F. The Amount of Tax Evaded for 1969

In January, 1976 Gregory Polvere, an I.R.S. Revenue Agent, was assigned to an investigation involving Levine and his 1969 tax return. (Tr. 278). Based on Polvere's examination of Levine's 1969 return, he concluded that a disallowance of the $287,489 contribution would result in an additional tax of $8,365. (Tr. 283).

The Defense Case

The defense first called two character witnesses both of whom were stockbrokers and familiar with Levine's "expertise" and knowledge in the securities business. (Tr. 364, 370).

Levine then took the stand and exhibited a remarkably selective memory. He testified in detail about his close relationship with his lawyer and friend, Frank. (App. 176-77). He claimed that in 1969 he had personal accounts with several brokerage firms, including Continental Securities, and recalled delivering his restricted Salem Electronics stock to Continental Securities, although he did not recall when this was done. (App. 182). He also claimed that the stock was returned to him sometime in 1969 at which time he remembered seeing his signature but not the guarantees on the certificate. (App. 185).

Levine contended that sometime in 1969 he met with Frank, although he was not certain where, at which time Frank discussed the possibility of Levine's making a charitable contribution to the Hillel School. (App. 180-81). This was the first time, Levine said, that he had ever heard of the school. (App. 209). Apart from his Hillel School contribution, Levine admitted he had never given any other contribution to an organization with which he had no contact and no knowledge. (App. 209).

Levine recalled that Frank told him he could make a donation to the school and obtain certain tax benefits. (App. 181). Levine claimed he followed up on Frank's suggestion and delivered the Salem Electronics stock to Frank *in 1969*. (App. 188, 212).

Levine claimed an inability to recall, however, whether the stock certificate was endorsed when he gave it to Frank (App. 198), although he admitted that he knew from his experience as a securities broker that in order to transfer stock for sale or donation, it was necessary for the certificate to be endorsed. (App. 198, 199). Levine also said he could not recall if, at the time he delivered the stock to Frank, the signature guarantee was on the reverse side of the certificate. (App. 189, 211).* Levine could only recall, he testified, that he gave the stock to Frank sometime in 1969, because that was when he "believed" the donation was made (App. 203), although no event in 1969 could trigger his memory as to why the donation was made in 1969 and not 1970. (App. 204). Levine was also unable to recall where the stock was

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* Levine's failure of memory in this regard was particularly convenient, since the Government had established that the guarantees could not have been placed on the certificate until approximately 5 months after Levine claimed to have given the gift of stock.

when it was delivered to Frank, as he had "no recollection of how it even happened." (App. 211).

Levine claimed that when he delivered the certificate to Frank, Frank told him he would prepare a letter to the charity to accompany the donation. Incredibly, Levine testified that he signed a blank piece of paper, and Frank must have later typed in the contents. (App. 189, 211). Levine claimed that the first time he saw the transmittal letter prepared by Frank was in connection with a 1973 audit by the Internal Revenue Service. (App. 190). Levine further claimed that he obtained the school's acknowledgement letter from Frank in connection with the preparation of his 1969 return, not by mail from the school. (App. 191, 212-13, 218).

Levine contended that between the time of his delivery of the stock and preparation of 1969 tax return, he did not talk to Frank about the contribution, because at that time he was travelling out of state on the average of once every three weeks. (App. 214-15). Levine could not, moreover, remember any conversation with Frank as to the amount he would be entitled to deduct (App. 217).

When Levine met with his accountant in 1970 to prepare his 1969 tax return, even though aware of the sharp decline of the stock's price after May, 1969, he did not believe it was necessary to confirm with Frank or anyone else that the contribution was actually made on May 26, 1969.

ARGUMENT

POINT I

The Trial Judge Did Not Err In His Supplemental Instructions Concerning The Negotiability Of Levine's Restricted Stock.

Levine claims that Judge Bonsal's supplemental instructions to the jurors erroneously led them to believe that his restricted Salem Electronics stock became "free stock," *i.e.*, saleable on the public market, one year after he began to hold the shares. He contends that the correct holding period during 1969-70 was two to three years* and that the Judge's incorrect instruction caused him prejudice, because the jury "apparently equated restricted stock with innocence; and negotiable stock, free stock, stock with value, with guilt." (Br. 22). This claim is meritless and utterly contrived.

An examination of the record makes it abundantly clear that the origin of the jury's request for supplemental instructions was its uncertainty whether Levine's restricted stock could be sold at any time. Judge Bonsal patiently and correctly clarified the concepts of negotiability and "restricted" stock for the jury—concepts which Levine's brief continues to confuse. The Judge advised the jury that, if restricted shares were properly endorsed and guaranteed, thereby making the stock negotiable, and if the sale was not to the public, but to a private party for investment purposes, the shares could at any time be sold. Any discussion concerning the holding period which was required to be satisfied before the Securities and Ex-

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* In support of this contention, Levine cites *Crowell-Collier Publishing Co.*, Sec. Act 3825 (1957), *Gilligan Will Co.* v. *SEC*, 267 F.2d 461, 468 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959).

change Commission would permit restricted stock to be sold to the public was clearly beside the point. Moreover, to the extent that there was any error in the Judge's reference to a possible one-year holding period, Levine (1) waived any claim on appeal by failing to specifically object to the supplemental instruction and (2) stood to benefit, not suffer, from the error.

A. The Supplemental Instructions

The law is quite clear that "restricted" stock, such as Levine's Salem Electronics stock, can only be sold in the public market if a registration statement is prepared and filed with the SEC or the stock has been held for a long enough period so that the SEC will be satisfied that it has been held for investment purposes. However, although restricted stock generally cannot be sold in the public market, it is always saleable, if properly negotiated, to a private party for investment purposes.

In the instant case, it was proved at trial that Levine had acquired his 16,666 unregistered shares of Salem Electronics stock as compensation in March, 1969. See p. 5, *supra*. Plainly, the stock was still unregistered and restricted in May, 1969 when Levine claimed he had given this stock to the Hillel School. However, a note from the jury during its deliberations disclosed that there was some confusion whether the fact that Levine's Salem Electronics stock was restricted in May, 1969 meant that he was completely disabled from selling it, as he quite plainly was not.

The jury asked: "With reference to the restricted stock certificate, at what point under what conditions would it or could it have become negotiable and therefore valuable to Mr. Levine." (App. 239). There ensued a colloquy between counsel and the court as to whether the

record contained evidence concerning how restricted stock becomes negotiable. (App. 240-43).

The court, with counsel's assistance, found evidence in the record on this question in the form of the testimony of Mr. Merendino, the Chemical Bank officer who had supervised Continental Securities' account and who had signed his name on behalf of Chemical Bank guaranteeing Levine's signature which appeared as an endorsement on the reverse side of the Salem Electronics stock certificate. Merendino had testified that restricted stock became negotiable, once endorsed and guaranteed. (App. 244-46).

After reading Merendino's testimony to the jurors, the court asked if the testimony clarified the matter, but the jurors remained confused. They still did not know if restricted stock had to be held for a certain period of time before it could be sold to anyone. The court, apparently not realizing that the jury did not yet understand that restricted stock, once made negotiable, could be sold to a private party for investment regardless of any holding period, said "I don't know as to any time. One year maybe." (App. 247).

When the jury then asked when restricted stock could be valuable to somebody (App. 247), Judge Bonsal recognized that the jury did not yet fully understand that restricted stock was always saleable in a private sale and therefore always had value. Accordingly, he advised the jury that stock always had some value, but that restricted stock had lesser value. (App. 247). He added that stock became negotiable, whether restricted or unrestricted, when properly signed and endorsed. (App. 249).

The court, with counsel's assistance, then also directed the jury's attention to the legend on the face of Levine's

stock certificate, indicating that the stock was restricted, and to Kolatch's testimony that when he received Levine's certificate, it was properly endorsed and guaranteed, making the stock negotiable. (App. 253-54).

The jury then asked whether at the point Kolatch received the stock could he sell it. The court answered that because of the legended restrictions on the face of the stock certificate, Kolatch could sell the stock publicly only if Salem Electronics filed a registration statement or if counsel opined that Kolatch could sell it without registration. (App. 254-55). A private sale could have been arranged by Kolatch, however, Judge Bonsal added, if the buyer was advised that the stock could not be sold publicly through a broker. (App. 255). The court then further clarified a juror's misconception that restricted stock could not be "converted into cash", by stating that restricted stock could be sold for cash to a buyer willing to hold the stock for investment purposes. (App. 255-56). The jury then retired to deliberate.

At this point, after the court had expended considerable time and effort in an attempt to explain under what circumstances restricted stock could be sold, defense counsel lodged an utterly unspecific objection to the Judge's supplemental instructions: he excepted "to any of the colloquy or any of the discussions had with the jury and the Court." (App. 256).*

Shortly thereafter, the jury sent out a note that it was deadlocked. The trial judge brought the jury back into the courtroom and advised the jury that the fact that the Salem Electronic stock was restricted was tan-

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* Defense counsel's general exception was made approximately 25 minutes (17 transcript pages) after the jury submitted its question concerning the restricted stock. (App. 239, 256).

gential to the real issue in the case: *i.e.*, whether the defendant evaded taxes or filed a false statement in his 1969 tax return. (App. 258-59). The trial Judge then delivered a modified *Allen* charge and excused the jury for the night. (App. 259-61). The following morning deliberations resumed, and the jury returned a verdict of guilty shortly before noon. (App. 276).

B. If There Was Any Error in the Judge's Supplemental Instructions, Levine Suffered No Prejudice and Waived Any Error by Failing to Object.

Levine's attempt to attack as prejudicial error the single brief passage of the Court's supplemental instructions dealing with the period of time which the SEC normally viewed as adequate to permit a sale of unregistered stock on the public market is simply a red herring. The record clearly demonstrates that the jury's inquiries were focused on whether or not Levine's restricted stock had value and was saleable in May, 1969, not on how long the stock had to be held before the SEC would be satisfied that restricted stock could be publicly sold.* Judge Bonsal correctly advised the jury that the restricted stock could be sold in M y, 1969 in a private transaction to a purchaser interested in buying for investment, and, in this regard, it was simply irrelevant whether the holding period was one, two or three years, since this restricted stock had been held for only 2 months and was saleable only in a private transaction.

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* The jury's concern about the potential saleability of restricted stock was hardly surprising, since if Levine's restricted stock did have value in May, 1969 (when Levine claimed he gave the gift), then it made little sense for Levine to give this gift to a charity such as the Hillel School to which he had no prior connection. On the other hand, if the restricted stock could not be sold at all in May, 1969, and therefore had no present value at all to Levine, his story about having given the stock to the Hillel School had some plausibility.

The contrived nature of Levine's claim becomes readily apparent when his claim of prejudice is read closely. Prejudice arose from the instruction concerning a one year holding period, Levine claims, because the jury "apparently equated restricted stock with innocence; and negotiable stock, free stock, stock with value, with guilt." (Br. 22). Levine's claim is as illogical as it is inscrutable. First, Levine's statement of prejudice confuses the very concepts of value, negotiability and free and restricted stock which Judge Bonsal so painstakingly clarified for the jury. Second, if the jury's concern was with whether or not the stock was restricted or free in May, 1969, as it plainly was, it made not the slightest difference whether the SEC followed a one or two or three year holding period as a rule of thumb; for in either case, the stock was still restricted in May, 1969.

Levine may be arguing, though this is not entirely clear, that Judge Bonsal's equivocal reference to a one year holding period may have led the jury to conclude that Levine's stock would have been free by March, 1970, one year after Levine first acquired the stock, at approximately the time Frank testified Levine first gave the stock to him for delivery to the school. But if this were so, Levine could only have benefited from such an understanding by the jury. For if, based on that instruction, the jury concluded erroneously, as Levine contends, that Levine's stock was freely saleable on the open market by March, 1970, Frank's version of his illegal arrangement with Levine became far less plausible. This is so, because if Levine was free to realize the full market value of the stock in 1970—$4^{3}/_{4}$ per share—in income, it would have made good sense for him to sell the stock publicly, rather than take an unlawful deduction for 1969 ultimately worth only $8,365 to him and carry forward for five years the

remaining portion of the contribution, not knowing what the ultimate value of the deduction would be.*

Since Levine stood only to benefit from this passing remark about the length of the holding period, it is not surprising that his counsel, an experienced securities lawyer, withheld any specific objection to the Court's holding period instruction. This strategic choice not to object waived any claim Levine might now have on this point. See *United States* v. *Ingenito*, 531 F.2d 1174, 1176 (2d Cir.), *cert. denied*, — U.S. — (1976); *United States* v. *Santiago*, 528 F.2d 1130, 1135 (2d Cir.), *cert. denied*, — U.S. — (1976); *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974).

Finally, even if Levine were found to have suffered some prejudice, the error was clearly harmless. The evidence which convicted Levine had nothing to do with the length of the holding period for restricted stock. Rather, what convicted Levine was (1) the evidence showing that the guarantees on the certificate could not have been put there until November 20, 1969, six months after Levine claimed he gave the stock to the school, see p. 6, *supra*; (2) the evidence showing the dramatic drop in the price of the stock which provided Levine an obvious motive to backdate the donation from 1970 to 1969; and (3) Levine's remarkable inability to recall certain facts concerning this once-in-a-lifetime donation of over $287,000 to charity, such as whether his endorsement had been guaranteed before he gave the stock to Frank.

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* The ultimate tax benefit in future years would be dependent on whether or not Levine's income increased or declined. In other words approximately $70,000 in income would be sacrificed for an unknown tax benefit in future years.

POINT II

The Trial Judge Did Not Abuse His Discretion In Refuing To Play For The Jury A Tape In Which Martin Frank Attempted To Suborn Perjury In An Unrelated Proceeding.

On direct and cross-examination, Martin Frank admitted to a variety of illegal acts, including his attempt to suborn perjury by Jerome Allen, a potential witness in Frank's 1974 securities fraud trial. Levine complains that the District Judge abused his discretion in refusing to permit the defense to play the tape recording of a conversation in which Frank attempted to suborn Allen. On the contrary, an examination of the pertinent law and facts makes it abundantly clear that Judge Bonsal acted well within the bounds of his discretion.

It is a well-settled principle that the court which first hears the evidence is best suited to rule on its admissibility. *Hamling* v. *United States*, 418 U.S. 87, 124-25, 127 (1974); *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, 236 (1947); *United States* v. *Kahn*, 472 F.2d 272, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). Questions of the relevancy of proffered evidence are to be determined in the discretion of the trial court, the exercise of which may be overturned on appeal solely upon a showing of a clear abuse of that discretion. *Hamling* v. *United States*, *supra*, 418 U.S. at 124-25; *United States* v. *Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974).

A corollary of this established pirnciple is that the admission of evidence on cross-examination and its scope are matters for the trial court's broad discretion. *Alford* v. *United States*, 282 U.S. 687, 694 (1931); *United*

States v. *Corr*, Dkt. No. 76-1115, slip op. 5891, at 5909 (2d Cir. October 22, 1976); *United States* v. *Green*, 523 F.2d 229, 237 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976). A trial judge's determination of the proper scope of cross-examination is treated with "great deference" by appellate courts, and the standard for reversible error is a clear abuse of discretion. *United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975). This is particularly true where it appears from the record that notwithstanding the exclusion of individual items of evidence the cross-examination has nonetheless been "full and searching," *United States* v. *Kahn*, *supra*, 472 F.2d at 281; or where further questioning will sidetrack the trial by involving the court in collateral issues which may cause undue delay or confusion. *Hamling* v. *United States*, *supra*, 418 U.S. at 127; Rule 403, Federal Rules of Evidence.

With these fundamental principles in mind, it is readily apparent that Levine's complaints are entirely without merit.

On direct examination Frank admitted to having been convicted of conspiring to violate the securities laws and having been sentenced to serve two years in prison and to pay a $2,500 fine. (App. 25-26). He also admitted to having pled guilty to evasion of taxes by back-dating his own gifts to charities, including a gift to the Hillel School; to having embezzled the securities of a client; to having pled guilty to evasion of taxes by backdating them; and to having resigned from the New York bar in 1976. (App. 25-26, 52-54). He further admitted to having attempted to suborn perjury by obtaining the signature of Jerome Allen to an affidavit which contained false information. (App. 54).

Frank was then subjected to vigorous and extensive cross-examination into his prior criminal record and

admitted misconduct. Defense counsel probed deeply into Frank's attempted subornation of perjury. (App. 73-81). During his cross-examination, Frank admitted that he tried to induce Jerome Allen to sign a false affidavit in connection with the securities fraud case which the Government had brought against Frank in 1974. (App. 73-74). Frank also admitted that, as a lawyer, he knew that what he had done constituted subornation of perjury. (App. 76). Frank further stated that he learned later that Allen was electronically wired and that his conversation with Allen concerning the affidavit was taped. (App. 74).

The defense, which had prior to trial been given an opportunity to listen to the tape and had been supplied with a transcript, then requested, in the presence of the jury, leave to play the tape. The trial judge refused to permit the tape to be played, deferring a final ruling until later.

Undaunted, defense counsel then proceeded to ask Frank whether he recalled the contents of the Allen tape and then, without directing his attention to anything on the tape, asked if playing it would help refresh his recollection. (App. 80). Judge Bonsal then ruled that he would not permit this and would defer a ruling on the admissibility of the tape until the defense case. (App. 81).

After the Government rested, the defense renewed its request to play the tape. (App. 162). The Court then noted that the Allen tape related to an entirely separate proceeding and asked defense counsel what the tape would add that had not already been testified to by Frank. (App. 163-64). When defense counsel replied that the tapes disclosed merely the "flavor" of the subor-

nation, Judge Bonsal ruled that the tapes were "collateral" and that, based on "the extensive cross-examination of Mr. Frank, I don't think, in my discretion they add anything. . . ." (App. 165).

The trial judge was fully justified in not allowing the Allen tapes to be played. The jury had already heard considerable evidence from which it could fully evaluate Frank's credibility. Furthermore, the defense vigorously cross-examined Frank to indelibly impress upon the jury that Frank had been a scoundrel. The defense, moreover, covered repeatedly and in considerable detail Frank's crime of subornation of perjury.*

The trial judge's refusal to permit the playing of the tape was also fully in accord with the Federal Rules of Evidence. Rule 608(b) states that specific instances of misconduct of a witness may be inquired into on cross-examination if probative of untruthfulness, but *may not be proved by extrinsic evidence.*

This case is in marked contrast to the cases upon which the defense principally relies. In *Pullman Co.* v. *Hall*, 55 F.2d 139, 141 (4th Cir. 1932) and *United States* v. *Varelli*, 407 F.2d 735, 751 (7th Cir. 1969), the defense was precluded altogether at trial from inquiring into the specific instances of misconduct of the witnesses. That was plainly not the case here.

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* During summation the defense reminded the jury that Frank had previously suborned perjury. (Tr. 496, 499, 505).

POINT III

The Trial Judge Did Not Err In Refusing To Accede To Defense Counsel's Request To Adjourn The Trial.

Levine argues that Judge Bonsal erred in refusing to delay the start of the trial by one day. More specifically, Levine contends that a continuance was needed so that his attorneys could review the *3500* and *Brady* material supplied to the defense by the Government in connection with Martin Frank's testimony.* This claim is frivolous. The record reveals that Judge Bonsal made every effort to accommodate defense counsel in their review of the material produced by the Government, and the record reflects that, when offered additional time to review the material, defense counsel did not request it.

It is axiomatic that a request for a continuance is addressed to the discretion of the District Court and a

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* Only two claims of prejudice are alleged by Levine. First, Levine contends that if he had an additional day to prepare for trial, he would have realized that a $10,000 check from the Hillel School to Frank's wife, although referred to in the list of *3500* material given to Levine, was not turned over. Levine does not explain why he waited until after trial to request this check and it is difficult to conceive how Frank could have been impeached by use of the check. It was simply repayment by the school of a loan made by a parent of a student to bail the school out of its financial difficulties. Such loans by parents of the Hillel School were, we represent, commonplace.

The only additional prejudice which Levine claims could have been avoided by a one-day adjournment is Levine's reference to Frank's file entitled "Levine, Jack, Miscellaneous, File No. 3085," containing allegedly a number of blank sheets of paper bearing Levine's signature. However, no such file was ever in the Government's possession. Nor is there any reference to such a file in the record below.

denial will not be reviewed on appeal absent a clear showing that the Court's discretion was abused. *United States* v. *Frattini*, 501 F.2d 1234, 1237 (2d Cir. 1974); *United States* v. *Barrera*, 486 F.2d 333, 339 (2d Cir. 1973), *cert. denied sub nom. Pinto* v. *United States*, 416 U.S. 940 (1974); *United States* v. *Rosenthal*, 470 F.2d 837, 844 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *United States* v. *Coleman*, 272 F.2d 108, 110 (2d Cir. 1959); *United States* v. *Echeles*, 222 F.2d 144, 153 (7th Cir.), *cert. denied*, 350 U.S. 828 (1955). Here, there was no abuse of discretion.

On July 9, 1976, the Court advised counsel that the trial in this case would begin on July 14, 1976. When the defendant in the trial immediately preceding this one became ill, the Court advised the defense and the Government on July 12, 1976 that the trial would begin one day earlier than scheduled, on July 13, 1976. (App. 11, 14, Tr. 9).

At 9:30 A.M. on the morning of July 13, 1976, defense counsel requested a one-day adjournment claiming that the *3500* * and *Brady* material ** produced by the Government the previous day was lengthy and additional time was required to review it. (App. 14-15).

The Court refused to delay the trial for a full day, but agreed (1) to delay the commencement of the trial until 2:00 P.M. that day; (2) to limit the afternoon pro-

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* By turning the *3500* material over the day before trial, the Government made it available before the law requires. See 18 U.S.C. § 3500(b); *United States* v. *Percevault*, 490 F.2d 126 (2d Cir. 1974).

** Although the indictment had been pending since May 24, 1976, defense counsel did not file their motion for *Brady* material until July 8, 1976.

ceedings to the selection of the jury, openings and direct testimony only; and (3) to grant a continuance after Frank's direct testimony if additional time was needed to review the material produced by the Government. (Tr. 9-13, App. 16).

Martin Frank did not take the stand to testify on direct until the morning of July 14, 1976 (App. 57). After Frank's direct testimony and before beginning his cross-examination, defense counsel made no request for the extra time offered by Judge Bonsal the previous day.

In light of these circumstances, it is clear that Judge Bonsal did not abuse his discretion.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HENRY H. KORN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 24 day of November, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Henry H. Korn

Sworn to before me this

24 day of November, 1976

Jeanette Ann Graver

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